In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

GULF OIL CORPORATION ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A7–A8) is not reported. The opinion of the district court (Pet. App. A1–A5) is reported at 296 F. Supp. 538. The order of the district court (Pet. App. A6) is not reported.

JURISDICTION

The order of the court of appeals was entered on May 23, 1969. The petition for a writ of certiorari was filed on June 19, 1969. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

357-807—69

QUESTION PRESENTED

Whether petitioners were entitled to immediate appellate review of the district court's denial of their motion to dismiss one count of a criminal indictment on the ground of double jeopardy.

STATUTE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

Petitioners seek review of an order of the court of appeals dismissing their appeal from the district court's denial of their motion to dismiss one count of a criminal indictment on the ground of double jeopardy. On February 28, 1969, the United States District Court for the District of New Jersey entered an order denying a motion by seven (including the four petitioners) of the eight defendants in *United States* v. *American Oil Co., et al.*, Criminal Action No. 153–65, to bar trial of and dismiss Count I of a three-count indictment on the grounds of double jeopardy and *res judicata*. Count I of the indictment, which had been returned on April 8, 1965, charged a violation of Section 1 of the Sherman Act, 15 U.S.C. 1, alleging that the defendants had fixed prices of automotive gasoline in the three-State area of Dela-

ware, Pennsylvania and New Jersey from 1955 to the return date of the indictment.[1] The motion to dismiss, filed on January 6, 1969, asserted that the previous indictment and trial of all of the instant defendants except American Oil Co., in a proceeding in the United States District Court for the Northern District of Oklahoma entitled *United States* v. *Arkansas Fuel Oil Corp.* (hereafter the "Tulsa case"), barred their trial on the instant indictment. In the Tulsa case, the indictment charged 29 defendants with conspiracy (directed toward a single price rise in January 1957) to fix the prices of crude oil and automotive gasoline throughout forty-four States, including Delaware, Pennsylvania and New Jersey, beginning in 1956 and continuing through January 1957. Directed verdicts for the defendants were entered in the Tulsa case.

Following submission of memoranda and oral argument, the district court issued an opinion (Pet. App. 1–5) denying the motion to dismiss Count I. The court held that the defendants had the burden of proving double jeopardy by a preponderance of the evidence and that they had failed to demonstrate that the offenses charged in the Tulsa and the instant indictments were the same.

Five of the seven defendants who had moved to dismiss filed appeals to the United States Court of Appeals for the Third Circuit. The government moved

[1] Counts II and III of the indictment charged four of the eight defendants with a combination and conspiracy to monopolize and an attempt to monopolize the automotive gas market in the same three-State area in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.

to dismiss the appeals on the ground that the order from which the appeals were taken was not a final order. After oral argument the motion to dismiss was granted (Pet. App. 7–8).[2] Four of the five appellants now seek review in this Court of the order of the court of appeals.[3]

ARGUMENT

The decision of the court of appeals correctly applies long standing principles of judicial administration in criminal proceedings established by Congress and this Court and does not conflict with the decisions of any other court. Further review at the present interlocutory stage of the proceedings is not warranted.

Congress has specified that an immediate appeal will not lie from an interlocutory order denying a motion to dismiss a criminal indictment, and that appellate review can be obtained only after a final judgment has been entered by the trial court. 28 U.S.C. 1291, 1292. The policy underlying this statutory requirement has been articulated in several opinions of this Court. See, *e.g.*, *DiBella* v. *United States*, 369 U.S. 121; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21; *Cobbledick* v. *United States*, 309 U.S. 323, 324–326. Indeed, this Court has said that the policy is applica-

[2] Four of the appellants also filed a "Petition for Writ of Mandamus or Prohibition" with the court of appeals to compel the district court to vacate its order and to dismiss Count I. On May 16, 1969, the court of appeals denied the petition. Petitioners do not seek review of this order.

[3] Three of the four petitioners are charged only in Count I of the indictment, but petitioner Gulf Oil Corporation is also charged in Counts II and III.

ble to appeals based upon claims of double jeopardy. See *Heike* v. *United States*, 217 U.S. 423, 432–433 (dictum).

Although Congress has recognized a need to permit interlocutory appeal from orders in specified situations (see *DiBella* v. *United States, supra*, 369 U.S. at 124–125), it is significant that "[e]very statutory exception is addressed either in terms or by necessary operation solely to civil actions" (*id.* at 126). This is because "* * * the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *Ibid.* Cf. *Stefanelli* v. *Minard*, 342 U.S. 117; *Douglas* v. *City of Jeannette*, 319 U.S. 157. Thus, while "* * * this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction'" (*Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152), virtually all cases in which appeal has been permitted from interlocutory orders have been civil cases, in which the interest in prompt final disposition is not so compelling as in criminal proceedings. See, *e.g.*, *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 688–689; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545–547. The only significant situation in which a pre-trial order in a criminal case has been held appealable before final judgment involves orders denying motions to reduce bail. *Stack* v. *Boyle*, 342 U.S. 1. But this type of order, unlike denial of a motion to dismiss the indictment, can be challenged on appeal independently of the underlying case, and

without interrupting the course of proceedings in the trial court.[4]

Petitioners suggest (Pet. 9) that the instant order may be treated as final because it is "collateral" in the sense that it does not go to the question of whether defendants violated the Sherman Act. But this ignores the fact that any motion to dismiss an indictment goes directly to the subject matter of the case in the more important sense that if orders denying such motions are immediately appealable the proceedings below cannot go forward until the appeal is decided. The instant case well illustrates the disruptive consequences of a rule which would permit immediate appeal from denials of motions to dismiss indictments. Although the indictment here was returned on April 8, 1965, the double jeopardy claim was not raised until January 6, 1969, and was rejected by the district court on February 28. The motion was made on behalf of only seven of the eight defendants, and challenged only one count of the three-count indictment. Even had the motion been granted, a trial of all three counts would still have been necessary to determine the issues re-

[4] Petitioners' reliance on *Kyle* v. *United States*, 211 F. 2d 912 (C.A. 9), is misplaced. There the court's entertainment of an appeal from an order denying a motion for speedy trial was expressly based on the special facts of that case (*id.* at 914). Appellant was a prisoner confined under a life sentence in federal prison in California, and the government had rather clearly indicated that it did not intend either to proceed with or dismiss a 17-year-old indictment pending in Oregon charging another offense. Moreover, in the same opinion the court held that a motion to dismiss the indictment was not appealable before final judgment.

maining.[5] Nonetheless, proceedings in the district court have had to be delayed while some of the moving defendants have sought review of the order. Petitioners were plainly entitled to consideration and determination of the double jeopardy claim before trial, and they will be entitled to appellate review of that claim upon appeal from an adverse final judgment. But to permit appellate review of such motions at any stage of the proceedings would invite such motions, no matter how frivolous, as a delaying tactic and frustrate the objective of expeditious and effective administration of criminal justice.[6]

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[5] Since, in the circumstances of this case, proof of the alleged participation by petitioners in the alleged conspiracy would, in any event, be properly admissible in the trial of the remaining alleged co-conspirators, the district court's denial of the present motion obviously was not a ruling "fundamental to the further conduct of the case." Cf. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153–154.

[6] The principle for which petitioners contend would presumably be applicable to such motions even if made and denied after impanelling of a jury and commencement of trial. In such circumstances a right to appeal would totally disrupt orderly criminal process.